Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

JOHN REINHARD III, JOHN REINHARD, and ELLEN REINHARD,

Petitioners,

v.

CHAPEL HILL-CARRBORO CITY BOARD OF EDUCATION; KEN TUOW, SUE BAKER, LAVONDA BURNETTE, MARY BUSHNELL, JUDITH ORTIZ, MARK ROYSTER, RUTH ROYSTER; and NEIL G. PEDERSEN,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY BRIEF

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I. PARENTAL LIBERTY

Petitioners ask this Court to review the Fourth Circuit's holding that Fourteenth Amendment parental liberty rights are non-fundamental, and its determination that government programs or laws that violate these rights need only be subject to rational basis review. In its opposition brief, the Chapel Hill-Carrboro City Board of Education ("the school district") blatantly mischaracterizes the issue presented in the Reinhard family's petition. The issue in the instant case is not and never has been whether parents may "exert pre-emptive control over the curriculum of a public school." Respondents' Brf. at 8. As the Fourth Circuit recognized, the issue is whether the Fourteenth Amendment right of parents to direct their children's education in any context is fundamental or non-fundamental. *Herndon v. Chapel Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177 (4th Cir. 1996); A-7.

Reduced to its essence, the question is not whether parents may dictate curriculum, but whether they have *any* rights with regard to their children's education. Moreover, the Fourth Circuit's holding is sweeping in its repudiation of parental rights: it applies equally to parents who educate their children at home or send them to a private school, in addition to those who send their children to public schools. The Fourth Circuit declares that no parent has a fundamental right to direct their children's education. *See Herndon*, 89 F.3d at 177-79; A-7-11.

The school district in its opposition brief hardly attempts to respond to petitioners' arguments concerning the primary role of parents in directing the education of

children. *See* Petition at 14-20.[1] Perhaps the school district recognized that it would be difficult to counter the overwhelming evidence from history and case law recognizing parental rights as one of the foundations of our Nation. Instead, the school district devotes almost its entire opposition brief to both mischaracterizing opinions from this Court and elsewhere and engaging in alarmist rhetoric concerning the supposed "consequences" of recognizing parental liberty rights. These incorrect contentions are addressed below.[2]

The Fourth Circuit opinion, barely mentioned by the school district in its opposition brief, provides perhaps the best rebuttal of the school district's arguments, for it

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[1] In its only counter to petitioners' argument from history and tradition, the school district claims that some common law decisions actually ruled against parents when disputes arose between families and educational officials. Respondents' Brf. at 16 n.7. Some courts did reject the claims of parents, but even in such cases, the underlying *rights* of parents were never questioned; the balance in those particular cases merely was struck on the side of the State.

[2] The school district also cites evidence from studies purporting to demonstrate that mandatory volunteering is a wise educational policy. Respondents' Brf. at 4-5. Petitioners could of course present studies to demonstrate that mandatory service is a terrible educational policy and the wrong way to teach young people about service. *See, e.g.*, Mark S. Sobus, *Mandating Community Service: Psychological Implications of Requiring Prosocial Behavior*, 19 Law & Psy. Review 153 (1995) (criticizing mandatory service programs as destructive of true charitable impulses). However, these policy disputes are entirely irrelevant to determining the program's constitutionality. This litigation is not about the merits of the school district's policy, but whether that policy traverses constitutional boundaries that protect individual liberties.

makes clear that this Court never has definitively resolved the question here. *Herndon, supra;* A-1-17. The Fourth Circuit noted that it was relying on dicta from this Court for its determination that parental liberty is a non-fundamental right. Moreover, the Fourth Circuit declared that the primary case relied upon by the school district, *Runyon v. McCrary*, 427 U.S. 160 (1976), in fact "did not decide how closely to scrutinize restriction of [parental liberty]." *Herndon*, 89 F.3d at 178-79; A-10.[3]

Furthermore, as the Reinhards set forth in their petition and as the Fourth Circuit acknowledged, the decision in *Wisconsin v. Yoder*, 406 U.S. 205 (1972), did not address Fourteenth Amendment parental liberty rights "standing alone," and was rather a First Amendment free exercise case that peripherally mentioned the right of parents to direct their children's religious education at home. *Herndon*, 89 F.3d at 178; A-9-10. One commentator recently noted that

> because the Court analyzed the claims in *Yoder* under the First Amendment, it did not determine which of the current standards of review – rational relation, intermediate scrutiny, or strict scrutiny – would apply to a due process-based

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[3] Moreover, *Runyon* and *Murphey v. Arkansas*, 852 F.2d 1039 (8th Cir. 1988), another case relied upon by the school district, do not involve "secular parental objections to the school curriculum," as alleged by the school district. Respondents' Brf. at 15 n.5. Rather, they addressed situations where parents were seeking to control their children's education at home without *any* governmental regulation. Of course, petitioners in the instant case do not argue that government can play no role in the education of their children, but rather challenge an overextension of governmental authority into the traditional realm of family decisionmaking.

> parental liberty claim. . . . Hence, the Court has never resolved which standard of review would apply to a claim grounded in that interest.

Miranda Perry (Note), *Kids and Condoms: Parental Involvement in School Condom Distribution Programs*, 63 U. Chi. L. Rev. 727, 735-36 (1996). *Runyon*, *Yoder*, and similar decisions merely reinforce petitioners' argument that the law of parental liberty is ambiguous and has led to conflicts among courts in interpreting the *Meyer-Pierce* line of cases.[4]

The school district correctly notes in another part of its brief that this Court's opinion in *Planned Parenthood of*

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[4] The school district and the Fourth Circuit are emphatically incorrect in asserting that non-religious objections to state regulation of educational matters are not cognizable under the Constitution. As the Reinhards set forth in their petition, the Fourteenth Amendment protects the right of parents from state intrusion into the education of their children whether or not the parents are religious or have specific religious objections to a program. Petition at 19 n.10. Perhaps the best example of the distinction between First Amendment religious liberty rights and Fourteenth Amendment parental liberty rights is *Meyer v. Nebraska*, 262 U.S. 390 (1923). In *Meyer*, the objection to state authority over educational matters was not religiously-based. Rather, the parents successfully vindicated their right to have their children learn foreign languages in public or private school without undue state interference. *See also Farrington v. Tokushige*, 273 U.S. 284 (1927) (Japanese parents vindicate Fourteenth Amendment right to educate children in schools tied to their cultural, as opposed to religious, heritage). Furthermore, while this Court in *Yoder* "made it clear that parents may lodge . . . objections under the First Amendment only when they are religiously based, nothing [in *Yoder*] states that parents could not bring nonreligious objections to state programs in other parts of the Constitution." Perry, 63 U. Chi. L. Rev. at 733.

Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), is the most recent statement concerning non-enumerated fundamental rights. Respondents' Brf. at 19. What the school district ignores, however, is that the *Casey* opinion recognized that "[o]ur law affords constitutional protection to personal decisions relating to . . . family relationships, child rearing, and *education*. . . . These matters . . . are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851 (emphasis added). Thus, contrary to the school district's contentions, this Court, "by continually acknowledging the importance of parental control and guidance and by referring to it as part of the right of privacy protected by the Fourteenth Amendment," consistently and strongly suggests that parental liberty rights are fundamental. *See* Perry, 63 U. Chi. L. Rev. at 736. This Court should grant the Reinhards' petition to resolve the uncertainty and conflicts in the law over the proper construction of parental liberty rights.[5]

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[5] Petitioners demonstrated the conflict between the Fourth Circuit's holding below and two recent decisions involving parental rights in the public school setting. *Curtis v. School Comm. of Falmouth*, 652 N.E.2d 580 (1995), *cert. denied*, 116 S.Ct. 753 (1996) and *Alfonzo v. Fernandez*, 606 N.Y.S.2d 259 (1993), *appeal dismissed without op.*, 614 N.Y.S.2d 388 (1994); Petition at 16-17. The school district in its opposition brief blatantly mischaracterizes the rulings in these cases, claiming that both cases involve issues outside of educational policy. However, the courts in these cases made clear that they were reviewing the condom distribution programs as part of a public school educational policy, not, as the school district contends, as a health policy. *See Curtis*, 652 N.E.2d at 584; *Alfonzo*, 606 N.Y.S. at 265-67. Moreover, both condom distribution programs and mandatory service programs represent instances of public schools going further than they have ever gone in the past, intruding into areas traditionally left to parental authority. Both

The school district also barely mentions the alternative to recognizing heightened protection for parental rights: relegating this right to non-fundamental status. The school district argues that even if educational requirements usurp parental authority, officials need only point to a "rational" educational objective in order for the program to be sustained. Respondents' Brf. at 18. As set forth in the petition, adoption of rational basis review for parental liberty claims will leave parents with no recourse. Petition at 20-21. Virtually any educational requirement could be justified on such entirely amorphous, but "reasonable" educational goals as strengthening the "ethics of social and civic responsibility" or recognizing "the contribution of different races, genders, and cultures." *See* A-61-62 (setting forth the educational interests or purposes of the mandatory community service program).[6] The primacy of the family under our

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programs also have little or no connection to the school curriculum; most condom distribution programs have some relation to a school district's interest in health education while the school district's service program has absolutely no connection to the classroom or traditional school curricula whatsoever. *See* Petition at 7 n.3; A-58, A-60. The Fourth Circuit's opinion in the instant case clearly conflicts with the holdings in *Curtis* and *Alfonzo* that parental liberty is a fundamental constitutional right.

[6] The Fourth Circuit notes that petitioners concede the "basic legitimacy" of these interests, but draws the wrong conclusion from this assertion. *See Herndon*, 89 F.3d at 179; A-11. While it may be true that the school district could legitimately further even these amorphous, "feel-good" educational interests in some fashion, the question is whether the means by which the school district chooses to fulfill these interests (coerced service to others over parental objection) is constitutional.

system of law simply does not allow such an incredibly deferential standard when governmental programs intrude into family matters.[7]

The Reinhards seek only to restore a right central to our Nation's history and traditions – the right of parents to have primary responsibility over the education of their children. Accordingly, the Reinhards urge this Court to grant their petition in order to determine whether

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[7] The school district raises a number of concerns about how parental rights would be recognized in the public school setting. *See* Respondents' Brf. at 17-18. It is at this point somewhat premature to address the standards and tests that should be used when parents claim that public school programs violate their right to direct their children's education. Before turning to how this right is to be construed in the public schools, this Court must first decide whether parents even have a fundamental right to direct their children's education. Moreover, the Fourth Circuit opinion applies with equal force to situations outside the public schools, primarily when state educational requirements violate parents' ability to send their children to private schools or educate them at home. Also, the school district's alarmist rhetoric about parental rights in the public schools is both hyperbolic and wrong. Parents could only challenge those programs that they could demonstrate violated their right to direct their children's education. Chief among these requirements would be to demonstrate that a particular program was coercive. *See Curtis*, 652 N.E.2d at 586 (recognizing parental liberty as fundamental, but rejecting parental challenge because program was not coercive; coercion "exists where governmental action is mandatory and provides no outlet for parents, such as where refusal to participate in a program results in a sanction or in expulsion," such as the program in the instant case). This Court should not allow the school district's absurd parade of horribles (Respondents' Brf. at 17-18) to distract from the overwhelming evidence from history and case law demanding that parental rights be protected.

parental liberty rights will be enforceable in modern educational disputes.

II. PERSONAL LIBERTY

The school district in the instant case has required an activity – volunteering – that throughout our Nation's history has been left to individual and family-decision-making. As petitioners previously have set forth (Petition at 22-25), the school district's program not only violates a fundamental principle of the common law, but also contradicts a freedom deeply rooted in this Nation's tradition of voluntary charity.

Nowhere does the school district attempt to respond to petitioners' argument concerning the centrality of voluntary charity to this Nation's history and traditions. Instead, the school district merely states that because deciding whether and under what circumstances to serve others does not appear on a "list" of protected freedoms set forth by this Court in *Casey*, such liberties should not be recognized. Respondents' Brf. at 19. However, as this Court consistently has held, fundamental rights do not derive from preconceived lists, but rather are those freedoms so deeply rooted in history and tradition as to merit recognition as fundamental freedoms. *See* Petition at 22. Deciding for oneself whether and how to serve others, without imposition of legal duties or government oversight, is a fundamental principle of Anglo-American law, a principle that the schools district eviscerates through its mandatory volunteering program. Petition at 22-26.

The school district also emphasizes that no court previously has recognized that individuals cannot be compelled by government to provide charitable service to

others. Respondents' Brf. at 19. A very good reason exists for the lack of case law on this issue: until the imposition of mandatory community service requirements, governments in this country never had imposed such duties on individuals. This Court should not without due consideration allow the setting of a dangerous precedent permitting governmental bodies, rather than individuals and families, to determine what obligations someone may owe to another.

The three historical examples provided by the school district to justify its program – required military service, mandatory road work, and jury duty – actually support petitioners' argument. Respondents' Brf. at 19. Throughout our nation's history, courts have recognized certain "civic duties" governments may impose on individuals. *See U.S. v. Kozminski*, 487 U.S. 931, 941 (1988) (setting forth "civic duty" exception to tradition of voluntary labor for laws deemed necessary for accomplishing specific public goals). However, the abiding principle of our Constitution is to limit the role of government in private affairs, not to serve as a basis of expansion of state-imposed obligations.

Furthermore, military service, jury duty, and required road work are narrow, historically-based duties individuals owe to the *State*. These duties were recognized at common law and courts did not impose constitutional restraints on governments if they chose to adopt these policies. *See Kozminski, supra.* In contrast, the school district's program, like a number of recently enacted programs, imposes an unprecedented duty on individuals to serve private parties, *i.e.* non-profit organizations and agencies in the community. The program is not founded upon any historical or common law tradition and indeed defies historical tradition. *See* Petition at 22-25.

Finally, the school district attempts to justify its program by pointing to its supposed educational benefits. Respondents' Brf. at 20. Any alleged benefit students may derive from coerced service to others is of course irrelevant to whether the program is constitutional. Educational officials cannot require young people to do anything they think may be good for them. Even more important, they cannot require students to perform an activity like volunteering that must spring from self-motivation, not from a state-imposed obligation. This Court should accept the Reinhards' petition in order to decide whether individuals will retain the right to determine whether and under what circumstances they will perform service to others.

CONCLUSION

For the reasons set forth in this reply brief and the petition for writ of certiorari, this Court should grant the writ filed by the Reinhard family.

Respectfully submitted,

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